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No. 91-2024

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

—against—

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO in her official capacity as President of the Borad of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT ATTORNEY GENERAL

STATEMENT OF THE CASE

New York has never opened its schools to indiscriminate use by the public at large when school is not in session. Instead, it has provided each of the more than 700 school districts in the state with limited discretion to determine whether to allow their local schools to be used for any of the particular purposes set forth in Education Law § 414.

The statutory list of uses which a school district may permit does not include religious use. The Court of Appeals for the Second Circuit held in this case that petitioners' First Amendment rights were not violated by the absence of authority for

their use of a local school for concededly religious purposes. In reaching that conclusion, the Second Circuit was faithful to the First Amendment and to this Court's precedents, and its judgment upholding the statute should be affirmed.

A. Education Law § 414

Since at least the middle of the last century, New York has scrupulously reserved its public schools for only particular non-school uses. Those uses are set forth in New York Education Law § 414 (52a).[1] New York intended, by allowing certain non-school uses of its school buildings, to provide a benefit only to the local community and to do so without sacrificing the schools' identities as such, even during the hours when students are not being taught within their walls. The legislative history of the statute, and its interpretation and implementation by the state commissioner of education, demonstrate the strict limitation imposed on the discretion of local school boards in considering applications for non-school uses.

1. History of the statute

The first reference in New York codes to the extra-curricular use of public schools was enacted in 1864, when the state legislature passed an act to "revise and consolidate" the general laws relating to public instruction. Laws of 1864, chapter 555. That act provided that the trustees of a school district

> may freely permit the school house, when not in use for the district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning, or in the science or practice of music.

Id., title VII, § 52.[2]

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1 References to pages of the appendix to the petition appear herein as "—a".

2 That provision was codified in 1909 as Education Law § 114, Laws of 1909, chapter 21, and entitled "Use of School-house out of school hours". *Id.* It was recodified as section 455 in 1910. Laws of 1910, chapter 140.

By 1913 the question of non-school use of school buildings had become a nationwide issue. *See, e.g.*, J.H. Bush, *Use of School Buildings for Other Than School Purposes*, 20 CASE AND COMMENT 255 (1913) (collecting cases); Note, *Use of Public School Property for Other than School Purposes*, 50 L.R.A. (N.S.) 1182 (1914). *See also Fact and Comment*, 80 THE SCHOOL JOURNAL 153 (March 1913) (reporting that Colorado voters had disapproved a measure providing for wider use and control of school buildings by the people, and also reporting on the efforts of Logansport, Indiana, to make its new schoolhouse a "social center"). "Probably the most frequent use for which school buildings were demanded was for religious meetings", Bush, *supra*, 20 CASE AND COMMENT at 256, and the cases which considered the right to such use—which the author found to be "surprisingly few in number"—were in conflict. *Id. See also id.* at 256-57 (collecting cases).

The issue of extending the use of its school buildings arose in New York as well. *Ninth Annual Report of the Education Department* ["*1913 Report*"] at 41 (February 3, 1913). In its report to the Legislature, the Education Department pointed approvingly to the contemporary Wisconsin law, which provided in substance that school buildings could be used for the "presentation and discussion of public questions" when they were not needed for school purposes, and that those buildings could "also be used for such other civic, social and recreational activities as do not interfere with their proper use". *Id.*[3]

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3 The Wisconsin law to which the 1913 Report referred was apparently Chapter 27, § 435d(1) of the Wisconsin Statutes (1911), entitled "Nonpartisan gatherings of citizens", which provided:

> Upon application of not less than one-half of the voters residing in the district, the school board or other body having charge of schoolhouses or other public buildings or grounds, which are capable of being more widely used as public meeting places for nonpartisan gatherings of citizens, for the presentation and discussion of public questions or for other civic, social or recreational activities, shall allow the use of such buildings or grounds for the open presentation and free discussion of public questions, and may allow the use of such buildings or grounds for such other civic, social and recreational activities as in the opinion of the

Shortly after the Education Department made its 1913 annual report, the New York Legislature passed "An act to amend the education law, relative to the powers of voters of school districts, and extending the use of school buildings" as part of a package of education-reform bills. Laws of 1913, chapter 221.[4] *See Current Topics*, 39 THE SCHOOL BULLETIN 419-20 (June 1913). Among other changes, the act replaced Education Law § 455 with a new text allowing more extensive use of school buildings after school hours and spelling out the five categories of permissible uses. The new section 455, which was later renumbered as section 414, Laws of 1947, chapter 820, contained provisions substantially identical to certain of those found in paragraphs (1)(a) through (1)(e) of current Education Law § 414(1), the statute at issue in this case.

2. Administrative interpretation

New York law gives the state commissioner of education authority to decide administrative appeals regarding the application of Education Law § 414. *See* Education Law § 310.[5] The commissioner's decisions reaffirm that the State's purpose in allowing extra-curricular use of its school buildings was to enhance the community service of the school buildings, not simply to provide public meeting halls. As the commissioner wrote in 1926:

> Schools are established and maintained for a definite and specific purpose, to wit, the secular education of the youth

controlling board do not interfere with the prime purpose of the building or grounds.

Wisconsin has since that time replaced that statute with one that provides, in part, that "[n]othing in this section prohibits the board from granting the use of school property to religious organizations [for temporary use]". Wisconsin Statutes Annotated 119.70(5) (1991 & Supp. 1992).

4 The direct legislative history for New York laws of that period is only rarely available. *See* E.M. Gibson, *New York Legal Research Guide* 104-05, 110 (1988). The direct history of the statute at issue here is not among those available.

5 Petitioners here did not pursue the administrative remedy available to them under the Education Law.

> of the State, and any activity within the scope of that purpose or tending to promote the welfare of the schools and the community should be allowed and encouraged.

Appeal of American Civil Liberties Union, 36 State Dep't Rep. 87, 97 (Educ. Dep't 1926).[6] "The Legislature never intended to throw the school buildings wide open as public forums where organizations and societies of every kind can assemble and discuss subjects of every nature." *Id.* at 98.

That view was echoed by the commissioner nearly 60 years later in dismissing an appeal from the denial of permission to distribute religious literature on school grounds:

> Implicit in [the applicant]'s argument is a misperception that the schools are a public forum open to all members of the community. Schools are not public places in the sense that their use may be demanded as a matter of right by an individual.

Appeal of Rathjen, 22 Educ. Dep't Rep. 595, 598 (1983) (citation omitted). In *Appeal of Ellis*, 77 State Dep't Rep. 32, 34 (Educ. Dep't 1956), the commissioner held that

> School buildings are erected for one purpose only, to provide a place in which the school district can instruct the pupils of the district. It is not a public building in any other sense. . . . No one other than teachers and pupils is entitled to access to the building generally. Even parents can be prevented from wandering about at will.

The school's auditorium, gymnasium and cafeteria, the type of large space presumably at issue here, were considered "classrooms exactly the same as any other place in the school used for assembly and instruction of pupils." *Id.*

Within the authority granted by section 414, local school districts have discretion to determine how their schools may be

6 From 1913 to April 1, 1958, judicial decisions of the Commissioner of Education were reported, together with those of other New York State agencies, in State Department Reports. Since April 1, 1958, they have been reported in Education Department Reports. *See Foreword*, 1 Educ. Dep't Rep. iv, vii-viii (1962).

used. *See Formal Opinion of Counsel No. 227*, 8 Educ. Dep't Rep. 225 (Educ. Dep't 1968). As the commissioner noted in dictum in *Appeal of Scanio*, 22 Educ. Dep't Rep. 315, 317 (1982), the discretion of local school boards is "not unlimited", even as to uses by such a closely school-related organization as the PTA. Accordingly, the commissioner has repeatedly prohibited school districts from allowing their schools to be used for purposes not explicitly provided by the statute.

In one of the earliest reported administrative decisions under the statute, *Appeal of Kennedy*, 2 State Dep't Rep. 625 (Educ. Dep't 1914), the commissioner sustained an appeal by a district resident complaining that a local trustee had permitted a "religious sect or denomination" to use the school house on certain evenings and on Sundays. The commissioner held that section 414

> specifies the purposes for which a school house and the rooms therein may be used outside of school hours. The use thereof is not permissible for any other purpose than those specified. The use for meetings conducted by a religious sect or denomination is not included within the uses expressly authorized by the statute, and such a use is therefore unlawful.

Id. at 625. *See also Rathjen*, 22 Educ. Dep't Rep. at 598, finding that "[r]eligious purposes are not among those enumerated in Education Law § 414".

Other examples of proposed uses which were held to fall outside the authorization of section 414 are the "use of a school facility for a private commercial venture", *Appeal of Board of Educ. of City School Dist. of City of Buffalo*, 21 Educ. Dep't Rep. 585, 588 (1982); meetings of labor union locals, *Appeal of Brett*, 5 Educ. Dep't Rep. 54 (1965); and even school-related uses, such as the storage of school buses on school grounds. *Appeal of Weiss*, 19 Educ. Dep't Rep. 308 (1979). Rental of school property was formerly held to be unauthorized, *Appeal of Steflovich*, 7 Educ. Dep't Rep. 76 (1967), but in 1976 the Legislature added limited authority to rent public schools for

the purposes set out in certain paragraphs of subsection 414(1). *See* Education Law § 414(2).

A community may not override the statutory limitations on its use of public schools other than as provided in the statute itself. *Appeal from Action of the Trustees of District No. 1, Town of Mohawk*, 31 State Dep't Rep. 447 (Educ. Dep't 1924) (public dances for individual's financial benefit); *Appeal in Relation to Use of School Building in U.F.S.D. No. 3, Town of Clarkstown*, 41 State Dep't Rep. 423 (Educ. Dep't 1931) (political meetings or rallies). Nor can a use expressly precluded by one provision of the statute be permitted under another. In *Appeal of Gaskin*, 1 Educ. Dep't Rep. 673 (1961), the commissioner found improper a political meeting held in a school building, despite the local board's belief that the meeting was "civic" within the meaning of subdivision 3 of section 414 [now paragraph (1)(c)], because subdivision 5 [now paragraph (1)(e)] expressly precluded the use.

By contrast, where the commissioner has upheld proposed uses, they have emphasized the statute's intention to serve the community rather than provide a forum for debate. *See, e.g., Appeal of Alcorn*, 24 Educ. Dep't Rep. 201, 204 (1984) (school facilities could be used for training session concerned with safety at a nearby nuclear plant because that use "pertained to the welfare of the community as a whole"); *Appeal of Erdberg*, 26 Educ. Dep't Rep. 464 (1987) ("flea market" held on school grounds for the purpose of raising funds for educational programs, not otherwise available to the students, "clearly pertain[ed] to the welfare of the community served by" the school and was permissible).

B. Proceedings Below

Petitioners brought this action for declaratory and injunctive relief against respondents school district and the president of its board of education (the "local school district") because the local school district refused to allow petitioners to use local school facilities during non-school hours for the purpose of showing a film series. *Lamb's Chapel v. Center Moriches*

Union Free School Dist., 770 F. Supp. 91 (E.D.N.Y. 1991) (16a). Petitioners conceded that the film series was of a religious nature and that its showing was for a religious purpose. *Id.* at 92 (18a).

On cross-motions for summary judgment, the district court found the facts to be undisputed, 770 F. Supp. at 92 (17a), and granted judgment to the local school district. The district court found that the local school district had not, by its policy or practice, "opened its doors to groups akin to Lamb's Chapel", *id.* at 99 (31a-32a), and held that the school district's denial of petitioners' applications was viewpoint-neutral and, hence, constitutional.

On appeal to the Second Circuit, petitioners asserted a challenge to the constitutionality of Education Law § 414 insofar as it failed to authorize their desired use of a public school. The New York Attorney General sought, and was granted, permission to intervene in defense of that challenge pursuant to 28 U.S.C. § 2403(b).

Applying the principles established by this Court, primarily in *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), and *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), the court of appeals determined that New York had created a limited public forum, devoting its public schools only to the uses specified in Education Law § 414. This case, the court of appeals wrote, "presented [an] outside organization[ ] seeking access where access has been limited and all religious use has been barred by policy and practice". *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381, 389 (2d Cir. 1992) (15a). Accordingly, the court held that "there is no basis for any claim of First Amendment violation here" (*id.*), and affirmed in all respects.

This Court granted certiorari on October 5, 1992. 113 S. Ct. 51 (1992).

SUMMARY OF ARGUMENT

The court of appeals correctly held that New York has created a limited forum in its public schools, as evidenced by the language of Education Law § 414. Its definition of the forum is consistent with this Court's decisions which recognize that, in opening an otherwise nonpublic forum, the state may limit the subject matter which may be presented.

Having defined the forum, the court correctly determined that the absence of religion from the list of uses permitted by the statute is both reasonable and viewpoint neutral and, therefore, constitutional. The statute draws a reasonable distinction between the use of schools for non-school purposes that serve the interests of the public in general, not purposes that serve the private interests of one group seeking to attract adherents to its point of view or, as here, to "instill[ ]" its values in the community's children "from an early age" (JA-86).[7] Religion is inherently such a private interest. The statute is viewpoint neutral because it does not authorize the presentation of any individual viewpoint for a purpose not included in the statute. In this case, petitioners were denied access not because they admittedly sought to present a *Christian* perspective, but because activities having a *religious* purpose are not a use permitted by the statute.

Petitioners' principal challenge to the constitutionality of Education Law § 414 is based on a flawed premise: that by allowing the schools to be used for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" pursuant to Education Law § 414(1)(c), New York has created a public forum in its schools, which is open to virtually any outside group for expressive activities. *See, e.g.*, Brief for Petitioners ("Pet. Br.") at 19. That argument overlooks the language of the statute itself, which includes nine other permitted categories of use which would be wholly unnecessary if petitioners were correct.

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7 References to pages of the joint appendix appear herein as "JA-___".

It also ignores numerous decisions by the commissioner of education finding uses other than religion unauthorized either by the paragraph on which petitioners rely or by the statute generally.

Petitioners' characterization of New York's policy as a form of "censorship" is equally without merit. Pet. Br. at 31; Brief Amicus Curiae of the Christian Legal Society et al. ("Christian Legal Soc. Br.") at 5. New York does not refer to religion or religious speech in the statutory provision at issue here, and does not single out religion for exclusion from non-school uses of its public schools. The commissioner's decisions illustrate that there are other non-permitted uses, having nothing whatever to do with religion.

There is no dispute that, if New York chose to do so, it could create the public forum for which petitioners advocate without offending the Establishment Clause. The decisions on which petitioners rely, *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990), and *Widmar v. Vincent*, 454 U.S. 263 (1981), made clear that an equal-access policy would not violate the Establishment Clause of the First Amendment. New York has not adopted such a policy, and neither *Mergens* nor *Widmar* requires that it, or any other state, do so. Petitioners have cited no authority for the proposition that lies at the heart of their case: that a state, having once opened its public schools for limited, specified purposes, must, as a matter of constitutional mandate, add religious uses to the list.

The result urged by petitioners in this case would strip the state and localities of control over their public school facilities and allow them but a single choice: prohibit all non-school use of public school property, regardless of the civic or community value it might offer, and keep the school buildings in darkness whenever students are not being taught; or open those facilities to all applicants, regardless of their intended uses, on a first-come, first-served basis. The former option needlessly restricts the use of important, and often centrally located, public property, while the latter converts it into a public meeting hall available for rental by anyone willing to pay the price. A state

might choose to adopt either of those courses, but the First Amendment does not demand that its options be so limited.

ARGUMENT

I

THE CONSTITUTION DOES NOT REQUIRE NEW YORK TO EXTEND ITS LIMITED SCHOOL FORA TO RELIGIOUS USES.

The First Amendment does not guarantee a right of access to all publicly-owned property merely because it is owned or controlled by the government. *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. *Adderley v. State of Florida*, 385 U.S. 39, 47 (1966). The existence of a right of access to public property, and the extent to which the government may place restrictions on that right, depends on the character of the property, or "forum", at issue. *International Soc. for Krishna Consciousness, Inc. ["ISKCON"] v. Lee*, 112 S. Ct. 2701 (1992); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

A. General Principles of Forum Analysis.

Three categories of fora have been recognized for First Amendment purposes. The "traditional public forum" includes streets, parks and other areas which "by long tradition or by government fiat have been devoted to assembly and debate". *Cornelius*, 473 U.S. at 802 (quoting *Perry*, 460 U.S. at 45). *See ISKCON v. Lee*, 112 S. Ct. at 2705-06. The only content-based exclusions a state may impose on traditional public fora are those which are narrowly drawn to serve a compelling state interest. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987); *Cornelius*, 473 U.S. at 800; *Perry*, 460

U.S. at 45. Petitioners have never contended that public schools are traditional public fora. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

At the other extreme is the "nonpublic forum", which describes public property "not by tradition or designation a forum for public communication". *Perry*, 460 U.S. at 46. *See also ISKCON v. Lee*, 112 S. Ct. at 2705. Limitations on expressive activity conducted on such property must only be reasonable and not predicated on disagreement with the speaker's view. *Id.* at 2705-06. *Board of Airport Commissioners*, 482 U.S. at 573 (quoting *Perry*, 460 U.S.at 46). *Accord Cornelius*, 473 U.S. at 806. Unlike the rules applicable to public fora, there is no requirement that restrictions on access to nonpublic fora be "narrowly tailored or the Government's interest compelling", nor is it required that a strict incompatibility exist between the "nature of the speech or the identity of the speaker and the functioning of the nonpublic forum". *Cornelius*, 473 U.S. at 808, 809. Respondents have never claimed that New York's public schools are non-public fora. Indeed, the purpose for enacting Education Law § 414 was to allow the community to benefit from the use of its schools after school hours.

The third category of forum is the "designated public place" forum, which is property that the state has intentionally opened for expressive activity. A designated public forum is not created by the government's inaction, or by its allowance of limited discourse, but, rather, by its intent. The courts therefore look "to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum". *Cornelius*, 473 U.S. at 802 (quoting *Perry*, 460 U.S. at 46). In addition, if the "objective, physical characteristics" of the property at issue, together with the actual public access and uses which have been permitted by the government, indicate that expressive activity would be "appropriate and compatible" with those prior uses, then the property has been designated as a public forum. *ISKCON v. Lee*, 112 S. Ct. at 2716, 2718 (Kennedy, J., concurring in the judgment).

A designated forum need not be the equivalent of a traditional public forum. A state may designate a forum for use by part or all of the public, *ISKCON v. Lee*, 112 S. Ct. at 2705, or, as the court below recognized, it may open the forum only for the discussion of certain topics. *See Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 46 n.7 and 48. Uses not specified in the designation of the forum may be excluded in the same way that uses may be excluded from a non-public forum. Accordingly, even if the exclusion is based upon subject matter, as in this case, or the speaker's identity, the exclusion need only be reasonable and viewpoint-neutral to pass constitutional muster. *Cornelius*, 473 U.S. at 800; *Perry*, 460 U.S. at 48. *See Board of Airport Comm'rs*, 482 U.S. at 573. *See also Greer v. Spock*, 424 U.S. 828 (1976) (political candidates can be excluded from speaking at a military reservation even though other members of the public are permitted to speak on other subjects); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city can exclude political advertising from advertising space in public transit system); *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Rel. Comm.*, 429 U.S. 167 (1976) (public meeting of school board was forum for discussion of matters relating to school system). *See also Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 680 (2d Cir. 1988).

B. New York's Schools are "Limited" Public Fora.

The Second Circuit held, correctly, that New York's public schools fit squarely into the category of limited public fora. The State has designated its schools to be opened, at the discretion of the local school district, for non-school use, but has expressly (and reasonably, *see* Point I.D., *infra*) limited the purposes for such use through legislated policy and consistent administrative practice.[8] Section 414 therefore cannot be read,

8 Because respondent Attorney General intervened to defend the constitutionality of section 414, he takes no position on the rules adopted by the local school district or their application in this case. However, the United States, as amicus curiae, agrees that the local school district was "not wholly indiscriminate" in granting access to

and has never been read by New York's education commissioner, to open the schools for "indiscriminate use by the general public", *Hazelwood*, 484 U.S. at 267 (1988) (quoting *Perry*, 460 U.S. at 37), as petitioners contend. Pet. Br. at 18-19.

1. The language of the statute

Section 414 sets forth ten categories of use to which local school districts may put their schoolhouses. Petitioners isolate a single one, found in paragraph 414(1)(c), and contend (Pet. Br. at 19) that the grant of authority to open schools for "social, civic or recreational" purposes creates a "forum generally open to the public", *id.* (quoting *Perry*, 460 U.S. at 45). They argue that

> it would be difficult to imagine a more expansive use policy than one explicitly open to any 'social, civic, or recreational use'.

Pet. Br. at 19. Amici American Civil Liberties Union et al. echo the argument. Brief Amicus Curiae of the American Civil Liberties Union et al. ("ACLU Br.") at 15.

The very existence in the statute of nine other designated categories of use demonstrates the fallacy of petitioners' argument. If paragraph (1)(c) alone accomplished the broad forum petitioners contend, then each of the other categories, found in paragraphs (1)(a), (b), and (d) through (j), would be superfluous. Yet the statute contains another paragraph providing for a "civic" use [¶ (1)(f)], and still another providing for a use that easily meets that description, *i.e.*, ¶ (1)(e), permitting use of schools for polling places, voter registration and nonpartisan political meetings. Moreover, since the enactment of the original statute in 1913, including the "social, civic and recreational" authority on which petitioners rely, the Legislature has amended or added to the statute no fewer than sixteen times. It is a basic principle of statutory construction that a statute should not be construed in such a way as to render any

its after-school forum. Brief for the United States as Amicus Curiae Supporting Petitioners ("United States Br.") at 11.

of its provisions superfluous or insignificant. *Rosado v. Wyman*, 397 U.S. 397, 415 (1970). *See Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970-71 (5th Cir. 1981) (quoting *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976)). The construction urged by petitioners, that paragraph (1)(c) is all-encompassing and opens the schools indiscriminately to all public non-school uses, would produce just that result.

2. Administrative interpretations of Section 414

The administrative interpretations of section 414 have confirmed that its reach is limited and not "expansive". *See* pages 4 through 7, *supra*. As this Court wrote in *Perry*, "selective access does not transform government property into a public forum". 460 U.S. at 47. *See also Cornelius*, 473 U.S. at 802.

As early as 1914, the year after the statute's enactment, the commissioner determined that because "religious use" was not included in the language of section 414, it was not included in the forum created by the statute. *Appeal of Kennedy*, 2 State Dep't Rep. 625 (Educ. Dep't 1914) ("The use [of the school house] is not permissible for any other purpose than those specified."). The New York Appellate Division held essentially the same thing, for the same reason, in *Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dep't 1978), and the Second Circuit adopted that holding in *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 680 (2d Cir. 1988), and in this case. 959 F.2d at 386-87 (10a-11a).[9] *Compare Lewis v. Board of Educ.*, 247 App. Div. 106, 286 N.Y.S. 174 (1st Dep't), *rearg. and motion denied*, 247 App. Div. 873, 288 N.Y.S. 751 (1st Dep't 1936), *appeal dismissed*, 276 N.Y. 490,

9 The United States (United States Br. at 3 n.2), suggests that *Trietley* would probably be decided differently under the Equal Access Act, which was passed after the case was decided. That result would not change the interpretation of the statute adopted by the Second Circuit. If the meaning ascribed to a state statute by a court of appeals is a rational construction of the statute and is not "plainly wrong", this Court will normally accept it. *Edwards v. Aguillard*, 482 U.S. 578, 609 (1987) (White, J., concurring in the judgment) (collecting cases). That "usual rule" applies in First Amendment cases like this one. *Id.*

12 N.E.2d 172 (1937), in which the Appellate Division held that religious organizations are permitted to use the public schools "for the conduct of ethical, educational, and cultural purposes, [but] *in no way for the inculcation of religious tenets*" (emphasis added).[10]

The detail with which the New York Legislature wrote its grant of authority to local school districts to open their school buildings, together with the consistent history of its application in the nearly eighty years of its existence, demonstrate that New York has not, by intention or by practice, created the sort of indiscriminate access that marks a forum designated to be public for all purposes. Public access to the closed after-hours schools is not "inherent in the open nature of the locations", as it is for most streets and parks, but remains, in each instance, a "matter of grace by government officials". *ISKCON v. Lee*, 112 S. Ct. at 2711 (O'Connor, J., concurring) (quoting *United States v. Kokinda*, 497 U.S. 720, 743 (1990) (Brennan, J., dissenting)). The Second Circuit therefore correctly held that New York treats its schools, by statute and by administrative practice, as limited fora.

C. The "Limited Forum" as a Limited Forum.

In disputing the finding made by the Second Circuit, petitioners contend that the court's use of the term "limited" to describe the forum created in New York's schools was "aberrant". Pet. Br. at 25. In their view, "there is no separate category of 'limited public forum' distinct from 'designated public forum' ", *id.* at 26, because the term "limited" is merely a synonym for the word "designated". *Id.* at 24. That argument, on its face, strains the language, for the two words cannot be interpreted as having the same meaning.

10 In this respect the United States (Br. at 8-15) errs in contending that this case is controlled by *Widmar v. Vincent*, 454 U.S. 263 (1981). Its argument begs the fundamental issue of this case: the nature of the forum established in New York's schools. In *Widmar*, which the United States contends is indistinguishable from this case, there was no dispute that the forum involved was "generally open to the public". 454 U.S. at 268-69. Having created a "generally open forum", *id.* at 269, the university could not then make exclusions based on content. On the other hand, as the Second Circuit correctly held, the facts of this case showed the creation of a forum not "generally open to the public" but, instead, limited to the purposes set forth in Education Law § 414. *Widmar* thus has no application here.

A more sensible interpretation gives the words their common meanings: a government may convert an otherwise-closed property into a forum by *designating* it to be so. The government is not, however, left with the choice between no forum and a broad, "first-come, first-served" open forum, such as the dedication of a new park. Instead, it may *limit* its designation of the forum based upon the category of speakers who may use it or, as both petitioners and the United States agree, the subjects that may be discussed there. Pet. Br. at 22-23; United States Br. at 9-10 and n.8. Otherwise, as Justice Blackmun observed in writing for the plurality in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." 418 U.S. at 304.[11]

The Second Circuit has used the term "limited forum" to refer to the type of designated forum created when a state designates public property to be used as a forum only for some purposes, but not for others. *Deeper Life Christian Fellowship,*

11 Amici ACLU et al. argue that the Court meant something other than what it said in suggesting the existence of a limited forum. They contend that the Court, although it did not in fact limit its reference, meant to refer *only* to meetings of public bodies, where persons attending must "stick to the business at hand", ACLU Br. at 6, and that the sole purpose for a limited forum is to allow a government body to "perform its official functions" by "maintain[ing] control over its own agenda". *Id.* at 14. While that description accurately describes the facts in *City of Madison, Joint School Dist. No. 8 v. Wisconsin Empl. Relations Comm'n*, 429 U.S. 167 (1976), cited by the ACLU, the description does not accommodate other cases in which the Court described the limited designation of the forum involved, where the purpose of the forum was to address not a government body but other participants in the forum. *See, e.g., Cornelius, Perry.*

852 F.2d at 679-80; *Calash v. City of Bridgeport*, 788 F.2d 80, 84 (2d Cir. 1986). The Third Circuit has similarly interpreted the notion of a limited public forum as being "designated for only limited uses or for a limited class of speakers". *Brody by Sugzdinis v. Spang*, 957 F.2d 1108, 1118 (3d Cir. 1992) (quoting *Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors*, 776 F.2d 431, 436 (3d Cir. 1985)).

> Restrictions of this type do not mean that the forum is non-public, but show that the government has created a 'limited public forum', a subset type of designated public forum, whose scope is circumscribed either by subject matter or category of speaker.

Id., 957 F.2d at 1118. *See also Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1261 (3d Cir. 1992), in which the Third Circuit adopted the limited-forum analysis of the Second Circuit in *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688 (2d Cir. 1991), discussed at page 19, *infra*. The Ninth Circuit has held similarly. *Monterey County Democratic Central Comm. v. United States Postal Serv.*, 812 F.2d 1194, 1196 (9th Cir. 1987) (only non-profit civic leagues or non-partisan organizations permitted to conduct voter registration drives on Postal Service property; partisan voter registration efforts prohibited).

The term "limited forum" as used by the Second, Third and Ninth Circuits is therefore neither novel nor "aberrant".[12]

12 Nor is the notion of a "limited" forum "badly circular", as petitioners (Pet. Br. at 26) and the ACLU (ACLU Br. at 16) contend. The difficulty with petitioners' argument is that it assumes the limited forum is defined by what it does *not* include, rather than—as the Second Circuit properly defined it—what it *does* include. A limited forum defined by a "content-based exclusion of speech" would likely prove circular, for the reasons asserted by petitioners and the ACLU. But the limited forum established by Education Law § 414 is defined by what it *includes*, namely, the categories of use set forth in the statute itself. Petitioners' characterization of the Second Circuit's holding as establishing a "religion-free" forum is, for that reason, misleading at best. *See* Pet. Br. at 26. Further, it is logical, and not at all circular, to conclude that whatever is not included by the statute is excluded. *See, e.g., Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (it is a general principle of statutory construction that when a statute enumerates specific things or acts, by implication it excludes those things or acts not enumerated, in the absence of contrary legislative intent).

Moreover, in suggesting that the Second Circuit has taken an "aberrant approach" in its forum jurisprudence, Pet. Br. at 25, petitioners ignore decisions which demonstrate that the Second Circuit will enforce a right of access for religious use when, in a particular case, a local school district exceeds the authority granted by section 414 and creates a forum for it by allowing other religious uses. That the Second Circuit did not do so in this case is simply a matter of the facts presented by petitioners, not a defect in the court's analysis.[13]

In *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688 (2d Cir. 1991), the local school district had permitted a religious Christmas program, "intended to celebrate the birth of Jesus", which consisted of Christian hymns and a Bible reading. 927 F.2d at 693. In the light of that practice, the Second Circuit held that the local district could not refuse another applicant for religious use on the ground that its proposal was not authorized.

> Permitting a fund-raiser with a religious theme while excluding one with a different religious theme is not viewpoint-neutral as a matter of law, absent a constitutionally sufficient explanation for the differential treatment.

Id. at 694.

Similarly, in *Deeper Life Christian Fellowship*, the Second Circuit upheld a preliminary injunction requiring the city board of education to allow a church to use the school building for worship services. The record in that case showed that the school board had "opened this forum" to the church by permitting other religious organizations to use the facilities, 852 F.2d at 680, and therefore the court of appeals could not say

13 The district court, after a factual hearing on the preliminary-injunction motion and after summary-judgment briefing, 770 F. Supp. at 98, 99 (30a, 31a-32a), specifically rejected petitioners' argument that their proposed use was an activity "of the sort permitted in the forum". Pet. Br. at 24. The Second Circuit affirmed that finding. 959 F.2d at 388 (13a-14a).

that the district court had abused its discretion in granting preliminary relief.

These decisions, together with the decision in the present case, demonstrate that the Second Circuit has properly applied the precedents of this Court to the facts of each case arising under New York's statute. To suggest, as petitioners do, that such a practice is "aberrant" is, in effect, to advocate for the jurisprudence of "categories" already rejected by this Court. *ISKCON v. Lee*, 112 S. Ct. at 2707. Thus, to create a general category of "public schools", or even "school facilities made available for social, civic, or recreational use by outside groups", as petitioners urge, would "unjustifiably elide what may prove to be critical differences" between states and school systems of which the Court should rightfully take account.[14] *Id.*

The decisions of other circuits upon which petitioners rely are not inconsistent. In particular, they do not stand for the broad proposition that "school facilities made available for social, civic, and recreational use by outside groups are designated public fora subject to the strict standards governing public fora". Pet. Br. at 19-20 n.8. *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991), involved a local school board policy allowing "any group [to] use the [school] facilities, as long as they do not seek to propagate or propound a religious message". 941 F.2d at 46. The school district had never refused access to any group other than religious organizations. *Id.* at 47.[15]

14 *See id.* at 2724 (Souter, J., concurring in the judgment in No. 91-339 and dissenting in No. 91-155); *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion of O'Connor, J.) (implicitly rejecting the categorical approach by examining whether "[t]he postal sidewalk at issue . . . [has] the characteristics of public sidewalks traditionally open to expressive activity"). *See also Brody by Sugzdinis v. Spang*, 957 F.2d 1108, 1120 (3d Cir. 1992) ("Public forum analysis is . . . highly fact-dependent"); ACLU Br. at 5-6 ("The question of when a religious group's use of government property presents a valid claim of equal access . . . turns on issues of context that necessarily are fact-specific").

15 The school district in *Grace Bible Fellowship* also had granted access for activities, such as (non-religious) fund-raising (*id.*), that would be unauthorized in New York schools under section 414.

Gregoire v. Centennial School Dist., 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990), expressly turned on the facts of the case, which showed that the school district had allowed a wide range of uses, including some religious uses but not others. *Id.* at 1369, 1373-76. In *Brody by Sugzdinis v. Spang*, 957 F.2d 1108, 1119 (3d Cir. 1992), the Third Circuit clarified its finding that the *Gregoire* school had been designated as a public forum, explaining that the school had opened its auditorium

> extensively to various groups including local labor unions and the Rotary Club, *and had even permitted religious speech* in an afternoon student forum, but had only denied access for an evening event by the particular non-student religious group.

Id. (emphasis added, citations omitted). It was because the particular religious group in *Gregoire* had been "singled out" for exclusion, *Brody*, 957 F.2d at 1119, while all others were granted access, that the Third Circuit found the school to have demonstrated an intent to designate it a public forum. *Id.*

The access policies at issue in *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973), and in *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978), also differed from that of New York. In *National Socialist White People's Party*, "[e]xcept for a few groups which had previously damaged school property, *no group ha[d] been denied the use of an available auditorium*" except the applicant in that case. 473 F.2d at 1013 (emphasis added). The school board had granted authority to a "wide variety of public and private groups on a first-come first-served basis". *Id.* Similarly, in *Knights of the KKK, Realm of Louisiana*, the state's policy was an "indifferent one", *id.* at 1128, "analogous to dedicating a public park: it threw open the doors of the gymnasium in question for after-hours use by all comers, on a first-come, first-serve basis." *Id.*[16]

16 The district court decisions on which petitioners rely also fail to support the broad generalization they advocate (Pet. Br. at 19-20

By contrast, New York has never been "indifferent" on the issue of access, much less "thr[own] open the doors" of its schools to "all comers" on a "first-come, first-served basis". Instead, Education Law § 414 specifies the only uses for which those doors may be opened, and the commissioner has consistently enforced its limitations.

D. New York's Limited Forum is Constitutional.

Public property that has been designated as a limited forum remains a "nonpublic forum" with regard to persons and purposes that are not included in the forum's definition, and the rules regulating access are the same as those applicable to nonpublic fora. *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 48. Petitioners acknowledge as much. Pet. Br. at 23. Restrictions that do not limit activities specifically designated for inclusion in the forum need only be "reasonable and 'not an effort to suppress expression merely because public officials oppose the speaker's view' ". *United States v. Kokinda*, 110 S. Ct. at 3121 (quoting *Perry*, 460 U.S. at 46). The restriction "need not be the most reasonable or the only reasonable limitation". *Cornelius*, 473 U.S. at 808. New York's statute meets both aspects of the applicable test.

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n.8). *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990), did not involve an access policy limited to "social, civic, and recreational" purposes, as petitioners contend, but rather presented a policy of allowing the local school to be "ordinarily used for public events *of all types*". 735 F. Supp. at 752 (emphasis added). The school district in *Wallace v. Washoe Co. School Dist.*, 701 F. Supp. 187 (D. Nev. 1988), had made its facilities "open to the general public", *id.* at 189-90; the court's opinion did not suggest that any attempt had been made to limit the authority to do so. And in *Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207 (D. Kans. 1983), the school district had opened its facilities to "recognized community groups"; the dedication of the buildings to that indiscriminate purpose made them "virtually the same, in concept, as streets and parks as far as the First Amendment is concerned". *Id.* at 1215.

1. New York's definition of the forum is reasonable

New York has always treated the limited opening of its school buildings during non-school hours as a means to foster the general knowledge of the community. In 1913 the Education Department had urged wider use of the school buildings for the "betterment of [the people's] social and intellectual standards", *1913 Report* at 41-42, and it was shortly after that advice that the predecessor to Education Law § 414 was enacted. As the Second Circuit found in *Deeper Life*:

> [T]he thrust of the statute is to promote general knowledge, *rather than to provide a forum for proselytizing or indoctrinating the public in a particular group's beliefs.*

852 F.2d at 680 (emphasis added). The long and consistent history of the statute's application towards that purpose precludes a claim that it has "no other government purpose than the provision of a place for expression". AFL-CIO Br. at 3, 11. Instead, the forum designated by Education Law § 414(1)(c) is limited to uses intended or designed to "pertain[ ] to the welfare of the community".

The ten purposes set forth in Education Law § 414(1) may be grouped conceptually into two categories which fulfill the statute's purpose. The first covers the type of activities with which public schools are traditionally associated: education and activities for children. This category includes

> — instruction in any branch of education, learning or the arts [paragraph 414(1)(a)];
>
> — instruction of mentally-retarded minors in classes provided by a private organization approved by the commissioner of education [¶ (1)(g)];
>
> — recreation, physical training and athletics [¶ (1)(h)];
>
> — child care [¶ (1)(i)]; and
>
> — graduation exercises by not-for-profit elementary and secondary schools, so long as no religious service is performed [¶ (1)(j)].

The second category includes the remaining six uses:

— public-library uses [¶ ((1)(b)];

— the "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" at issue here [¶ (1)(c)];

— meetings, entertainments and occasions where admission fees are charged [¶ (1)(d)];

— use for polling places, voter registration and non-partisan political meetings [¶ (1)(e)]; and

— civic forums and community centers [¶ (1)(f)].

Each of those uses supports the distinction recognized by the Second Circuit in *Deeper Life* that under New York law "access to the school property is permitted *only where it serves the interests of the public in general*, rather than that of sectarian groups." 852 F.2d at 680 (emphasis added). In the service of that distinction, for example, the statute allows political meetings, but precludes those meetings from being sponsored by a political organization unless authorized by the vote of a district meeting. Education Law § 414(1)(e); *Appeal of Gaskin*, 1 Educ. Dep't Rep. 673 (1961).

The community-service/private-interest distinction in public-school uses embodied in section 414 is the most fundamentally reasonable distinction that can be made concerning access to public properties, and especially public schools, that are not by tradition opened for public speech. Unlike the community purposes for which authority is designated in the statute, religion is an "individual experience", *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting in part), that is "inviolately private". *Everson v. Board of Educ.*, 330 U.S. 1, 58 (1947) (Rutledge, J., dissenting). Religion "must be a private matter for the individual". *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971). Religious advocacy, like petitioners' effort to persuade community residents to "instill[ ]" "Christian values" in their children "from an early age" (JA-86), serves the community only in the eyes of its adherents and yields a benefit only to those who already believe.

To require New York to extend its limited forum to provide a pulpit for religious advocacy like that at issue here would inescapably "interfere in a significant way with the uses to which the government has as a factual matter dedicated the property". *ISKCON v. Lee*, 112 S. Ct. at 2718 (Kennedy, J., concurring in the judgment). *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 571-73 (1975) (Rehnquist, J., dissenting), suggesting that a city could properly devote its municipal auditorium to the cultural enrichment of "the whole family" without thereby being required to provide a forum for other purposes. *See also* AFL-CIO Br. at 9. *Cf. Widmar*, 454 U.S. at 267 n.5 (1981) ("We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.").

Indeed, requiring New York to add religious advocacy to its school-based forum would convert the state's public schools from the limited community-service fora which the statute contemplates into the "functional equivalent of a municipal auditorium or hall" which amici ACLU et al. contend they should be. ACLU Br. at 6. In short, neither law nor fact demands that New York drastically alter the definition of its after-school fora in order to accommodate petitioners' desire for a forum not otherwise available to them.[17]

2. New York's definition of the forum is viewpoint-neutral.

Petitioners, supported by the United States, contend that section 414 is not viewpoint-neutral and, in particular, that it is

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17 There is no suggestion in the record that, absent the use of Center Moriches' school, petitioners were unable to present their film series. The availability of alternative channels of communication supports the conclusion that the limitations on New York's forum are reasonable. The First Amendment does not demand unrestricted access to an otherwise–nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message. *See Cornelius*, 473 U.S. at 809; *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. at 129.

"anti-religious". Pet. Br. 31. *See* United States Br. at 20. The argument confuses the concepts of viewpoint neutrality and content neutrality. As Justice Brennan explained in his dissent in *Perry*, viewpoint neutrality refers to particular speakers, not whole categories of speech. 460 U.S. at 59 (Brennan, J., dissenting). It is the principle of content neutrality, not viewpoint neutrality, that is relevant where restrictions are imposed on "speech related to an entire subject area", *id.*, and content neutrality is not required where, as in this case, the forum is limited. *See* discussion at pages 12-13, 22, *supra*.

Section 414 does not present an issue of viewpoint discrimination because the unavailability of New York's schools for religious purposes, among others, is not based on an objection to the tenets of any particular religious group. Section 414 provides no discretion to grant permits for any religious uses. *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79, 83 (2d Cir. 1991). The restriction of public-school use to the purposes set forth in Education Law § 414 is therefore "not aimed at particular parties, groups, or points of view", *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973), and was properly regarded as viewpoint neutral by the court below. *See also Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).

To the extent that petitioners, supported by the United States (United States Br. at 17-19), contend that section 414 precludes the "religious" viewpoint of some otherwise-permissible subject, the question is not presented by this case.[18] Petitioners did

18 From the record, it appears that the local school board decided only that petitioners' film series was not permissible because of its conceded religious purpose, without reaching the question of whether the film series would have satisfied section 414 if it had not been religious in nature. There is therefore no support for petitioners' suggestion, and the United States' fundamental assumption that petitioners' film series was "otherwise permissible" under the statute. *See* Pet. Br. at 16.

In any event, under state law it is the applicant who has the burden of demonstrating that its proposed use meets a criterion of section 414. *E.g.*, *Appeal of Smith*, 15 Educ. Dep't Rep. 491 (1976); *Matter of Use of the School-house in District No. 4*, 5 State Dep't Rep. 618 (Educ. Dep't 1915). Thus, beyond the bare assumption that their proposed use would have met a criterion in section 414, as to which the record contains no finding, there is no basis for petitioners or amici to argue that petitioners have been excluded from a forum in which their film series would "otherwise [have been] permissible". United States Br. at 17. *See* Christian Legal Soc. Br. at 29.

not seek to present the viewpoint of "religion"; their viewpoint was limited to, and described by them as, that of "*Christian* values" (JA-86) (emphasis added) and the "*Christian* perspective" (JA-91) (emphasis added). The district court found, and the court of appeals affirmed the finding, that the statute did not provide for any religious use whatever, 959 F.2d at 386-87 (10a-11a), and that the local school district had not made a forum available to any religious perspectives at all. *Id.* at 388 (14a). Therefore, petitioners' Christian viewpoint was not discriminated against while the viewpoint of another religion was permitted. Rather, all religious use, including petitioner's, was properly not included in the forum. *See Widmar*, 454 U.S. at 281 (Stevens, J., concurring) (university could not allow "a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege"); *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Rel. Comm.*, 429 U.S. 167, 175 (1976) (viewpoint discrimination prohibits granting to "one side of a debatable public question . . . a monopoly in expressing its views").

Furthermore, petitioners' reliance upon an undifferentiated "religious" viewpoint threatens to dissolve the important difference between generalized "content" and individual "viewpoint" as those terms have been used by this and other courts. *See e.g.*, *Perry*, 460 U.S. at 59 (Brennan, J., dissenting); *Monterey Co. Democratic Cent. Comm. v. United States Postal Serv.*, 812 F.2d 1194, 1199 (9th Cir. 1987) (rejecting "expansive characterization of the collective position of all partisan groups as a 'viewpoint' "). Any use, even one expressly prohibited, can be presented as somehow a "viewpoint" of some other, permitted use. *Cf. Appeal of Gaskin* (prohibited meeting with political candidates presented as a form of "civic" use).

For example, meetings of labor union locals are not authorized by section 414, *see Appeal of Brett*, but if viewpoint means nothing more than petitioners urge, a labor union local could argue that its meetings should be held in the school's auditorium because the activities to be discussed are designed to provide higher wages, thereby improving workers' family lives. Section 414 authorizes only non-school uses, *Appeal of Weiss*, but any "school related use" can easily be presented as having the "purpose" of enhancing a family's raising of its children.

Petitioners' argument that religion is merely the viewpoint by which they would discuss "contemporary family values" would thus remove all limitations from this limited forum, and the device would effectively accomplish indirectly what petitioners set out to accomplish openly: the abolition of the limited forum, where decisions about access may be based upon content. For the reasons already discussed in Part I.C., *supra*, that result is not required by the First Amendment.

To agree with petitioners, that a forum opened for some limited purposes must also be opened to religious purposes, presents the state with the stark choice between indiscriminate access and no access. Faced with that all-or-nothing choice, governments will likely decline opportunities to create fora in their property. The Solicitor General, representing the petitioner in *Cornelius*, recognized the important public benefit put at risk by indiscriminate access, arguing in that case that:

> The decision of the court of appeals [requiring open access] ultimately would force the President to restructure the Campaign quite substantially or, alternatively, to abolish the Campaign entirely.

Brief for Petitioner at 16. "The First Amendment does not mandate a result so at odds with common sense." *Id.*

The present circumstance illustrates the point well: If neither New York nor any of its local school districts has any more choice than to lock the school-house doors as soon as the last pupil and teacher have left, or to keep them wide open to "all comers", then at least some of those school districts may opt

for the former and close the forum altogether. The First Amendment interest in encouraging the marketplace of ideas, *Widmar*, 454 U.S. at 267-68 n.5 (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)), is not furthered, and no public interest is served, by that result.

II

SECTION 414 DOES NOT UNCONSTITUTIONALLY RESTRICT CONTENT

Petitioners contend that, "[e]ven apart from the First Amendment forum doctrine" (Pet. Br. at 31), the "policy in question" in this action represents unconstitutional content-based censorship of pure speech. *Id.* Despite their disclaimer, the argument is a variation of their forum argument, as petitioners themselves make clear by their citation to *Widmar* (Pet. Br. at 34). Further, to the extent that it is addressed to the policy established by Education Law § 414, it is unfounded.

Petitioners' argument is premised on their contention that the "Second Circuit held that a public school district may deny outside organizations equal access to the after-school use of its facilities *solely on the basis of the religious content or purpose of the planned use*." Pet. Br. at 32. Petitioners err, however, because that is not the issue presented by the New York statute. Instead, the Second Circuit correctly held that it did not offend the Constitution for New York to decline to include religion in the forum it had designated for matters of general community interest. The state could reasonably, and therefore constitutionally, not extend its limited forum to religious purposes. Point I, *supra*.

Additionally, religious speech is but one of the many potential uses to which New York has not opened its public schools. *See* pages 6-7, *supra*.[19] Thus, the statute makes no attempt to

19 The one case cited by petitioners on this point, *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105 (7th Cir. 1986), did state in *dictum* that the "government's interest in interfering with the free

"single out and censor" (Pet. Br. at 33) any speech, religious or not, nor does it have that effect. Instead, the relevant inquiry in each case is whether the purpose of a proposed use fits any of the categories for which the schools have been opened. Beyond those categories, no one is entitled to access for any purpose, religious or otherwise.[20] As petitioners agree, a speaker is not "automatically free from otherwise lawful regulation simply because the speaker communicates religious sentiments". Pet. Br. at 33 (footnote omitted).[21]

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market in ideas through discriminatory restrictions on particular points of view (such as the religious) is slight". *Id.* at 1114. However, the Seventh Circuit affirmed summary judgment for the school district, and held that the school district had not created a public forum for meetings by allowing teachers to discuss labor relations; by hosting meetings of the P.T.A., the Boy Scouts, the Girl Scouts, "fine arts groups" not further defined, and booster clubs; by allowing the school to be used as a polling place on election day; by permitting a religious group to use a school for a time after its church burned down; or by allowing any meetings by teachers except prayer meetings. *Id.* at 1114-15. Additionally, the Seventh Circuit's holding further supports the conclusion that all school districts are not equivalent. *See* discussion at page 20 , *supra*.

20 As a matter of New York law, a local board of education has no authority to put its school building to extracurricular use beyond those granted it by statute. *E.g.*, *Basset v. Fish*, 75 N.Y. 303 (1878); *Appeal of Palmiter*, 64 State Dep't Rep. 222 (Educ. Dep't 1942). For that reason, the local school district respondents were in error in stating to the district court that

> [i]n the absence of Section 414 of the [New York] Education Law . . . the School District would be obligated to allow access to the facilities for religious groups on the same basis as any other groups may be allowed access.

Mem. in Support of Motion for Summary Judgment at 15 (Nov. 15, 1990), *as quoted in* Pet. Br. at 22. "In the absence of Section 414", the school district would be unable to allow *any* access to the school building after school hours, because it is only in that statute that the school district finds any authority to do so. Section 414 creates authority, it does not limit existing authority and does not "exclude" anyone.

21 Petitioners confuse the identity of the speaker, which is not an issue under Education Law § 414(1)(c), with the purpose of the proposed use. They contend that Lamb's Chapel was an "otherwise eligible speaker" (Pet. Br. at 31) and, "*as an entity*, is eligible to use school facilities for 'social, civic and recreational meetings'." *Id.* at 34 (emphasis in original). The briefs amicus curiae of the National Jewish Commission on Law and Public Affairs ("COLPA") (at 7) and the Christian Legal Society (at 2, 6) raise the same point. However, there has been no suggestion in this case, by the parties or the courts below, that the identity of the applicant rather than the nature of the proposed use has any bearing on the decision of how local school buildings may be used. *See* Christian Legal Soc. Brief at 4 n.1, conceding that the denial of access here was not based on the religious identity of the applicant.

Moreover, the New York courts have concluded that only "use" is relevant. *See Lewis v. Board of Education*, 157 Misc. 520, 525-26, 285 N.Y.S. 164, 169-70 (Sup. Ct. N.Y. Co. 1935), *modified*, 247 App. Div. 106, 286 N.Y.S. 174 (1st Dep't), *rearg. and motion denied*, 247 App. Div. 873, 288 N.Y.S. 751 (1st Dep't 1936), *appeal dismissed*, 276 N.Y. 490, 12 N.E.2d 172 (1937):

> The manifest vice of the plaintiff's position is that he has confused the racial and religious affiliations of the *users* of the school buildings with the *purpose* for which the buildings are used. The restrictions relate to the *use*. . . . It is the *use* to which the buildings are put, and not the *identity* of the users, that is decisive of the lawfulness of the use.

Id., 157 Misc. at 525-26, 285 N.Y.S. at 169-70 (emphasis original in official report).

22 See pages 20 through 22, *supra*, for discussion of these cases.

23 The argument made by the ACLU, which goes too far, helps to make this clear. They contend that New York's schools are "open to all speech except that which is excluded". ACLU Br. at 19. To the contrary, as the language and history of Education Law § 414 demonstrate, New York's schools are open to *no* speech except that which is *included* by the statute. *See also* Brief of COLPA at 3-4.

The absence of religious use from the list of authorized purposes therefore neither discriminates against, nor signals a hostility to, religion. Unlike the university policy struck down in *Widmar*, or the school policies at issue in the decisions of other circuits and district courts relied on by petitioners (Brief at 35 n.16)[22], Education Law § 414 does not "single[ ] out religion for direct discriminatory exclusion". Christian Legal Soc. Br. at 8. Section 414 does not even refer to religion, much less expressly prohibit religious use, and petitioners so concede (Pet. Br. at 9 n.5).[23]

Nor does section 414 impose a penalty or other sanction upon petitioners' desired speech, as in the cases they cite (Pet. Br. 32-33). Petitioners may freely engage in religious speech and, even after the local school board's decision, they may show their film series to anyone who chooses to see it, without state penalty. They simply have not been provided with the use of a public school in order to do so.[24]

III

SECTION 414 DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Petitioners assert that by not providing a forum for religion, Education Law § 414 violates the Establishment Clause. Pet. Br. at 36-37; Question Presented No. 4. The Second Circuit found it "difficult to see how this is so", 959 F.2d at 389 (15a), and rightly concluded that, "[i]f anything, a claim of a violation of the Free Exercise Clause would be expected". *Id.* Petitioners make no Free Exercise claim.

Petitioners demonstrate the validity of the Second Circuit's puzzlement by arguing, with no citation, that the "ultimate purpose" of the Establishment Clause is "the safeguarding of religious exercise against the power of the state". Pet. Br. at 37. The Establishment Clause is implicated here, they argue, because the case presents a "classic instance of explicit government repression of religion". *Id.* If, indeed, that were the "ultimate purpose", then the Free Exercise Clause would be mere surplusage. As this Court explained in *Lee v. Weisman*, 112 S.Ct. 2649, 2655 (1992) (quoting *Lynch v. Donnelly*, 465

24 Petitioners have not suggested that the public school was the only, or even the best, venue for their film series. By contrast, in *Widmar*, the plaintiff-students claimed to be "stigmatize[d]" because "having to explain that we meet off campus tends to make other students think there is something 'wrong' with us". *Chess v. Widmar*, 635 F.2d 1310, 1317 & n.9 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981). Petitioners here have made no such claim. *See* note 18, *supra*.

U.S. 668, 678 (1984)), the fundamental purpose of the Establishment Clause is to guarantee that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which " 'establishes a [state] religion or religious faith, or tends to do so' ". *See also Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). Plainly, those concerns are not at stake here, and therefore the analysis required in Establishment Clause cases is inapplicable.

There is, in any event, no merit to petitioners' Establishment Clause claims.

A. The Establishment Clause Does Not Require Equal Access

Petitioners contend that, after *Mergens*, the decision to adopt an equal access policy would not offend the Establishment Clause. Pet. Br. at 21. Even if true, it still must remain the choice of the state whether to adopt such a policy at all. The Establishment Clause does not eliminate that choice. As Justice White wrote in dissent in *Widmar*:

> The Establishment Clause . . . sets limits only on what the State may do with respect to religious organizations; it does not establish what the State is *required* to do. . . . The step from the permissible to the necessary . . . is a long one.

454 U.S. at 282 (emphasis original). Furthermore, the First Amendment does not require that every protected speaker be provided with the chance to speak. *E.g., Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241 (1974). *See also Rust v. Sullivan*, 111 S. Ct. 1759 (1991). As this Court wrote in *Hazelwood*, 484 U.S. at 270-71,

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker* [*v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969)]—is different from the question whether the First Amendment requires

a school affirmatively to promote particular student speech.

If, as petitioners contend, the Establishment Clause standing alone required such a policy, then Congress would have had no need to adopt the Equal Access Act at issue in *Mergens*.[25] Yet, this Court has already found in *Mergens* that the Equal Access Act was intended to "do more than merely validate the status quo". 496 U.S. at 239. The language of the statute ("It shall be unlawful . . .") creates a right, rather than reflecting an existing one based in the Constitution. 20 U.S.C. § 4071(a). *See Student Coalition for Peace v. Lower Merion School Dist.*, 633 F. Supp. 1040, 1043 (E.D. Pa. 1986) (by enacting the Equal Access Act, Congress afforded students a right "beyond the constitutional guarantees in the first amendment").

Petitioners also suggest that the absence of such a policy reflects a hostility toward religion. Pet. Br. at 36. However, the statement from *Mergens* upon which they rely does not support that conclusion. Although the Court stated that:

> if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion,

496 U.S. at 248 (plurality), the sentence was part of the Court's discussion of *Widmar* and the finding in that case that the university had adopted an open-forum policy. Indeed, in a sentence following petitioners' quotation, the Court referred to the finding in *Widmar* that the university had made its facilities available to " '[a] broad . . . spectrum of groups'—both nonreligious and religious speakers". *Mergens*, 496 U.S. at 248, (quoting *Widmar*, 454 U.S. at 274). Accordingly, it is not merely the absence of a policy of access that evinces hostility, as petitioners assume, but the exclusion of religion when the door is open to everyone else. That is not this case.

25 Although Justice Stevens, dissenting in *Mergens*, suggested that the Equal Access Act was intended by Congress to "preclude continued unconstitutional discrimination", 496 U.S. at 274, his discussion pertained to the forum issue, not to the Establishment Clause argument urged by petitioners here.

B. Enforcement of the Forum's Definition Does Not Violate the Establishment Clause

Petitioners also contend that the Establishment Clause will be violated by local school districts in implementing Education Law § 414. They believe that the local school district will "inevitably entangle itself" with religion by the "mere enforcement" of the policy defining the forum, because someone will need to determine "which words and activities fall within 'religious worship and religious teaching' ". Pet. Br. at 37 (quoting *Widmar*, 454 U.S. at 272 n.11).

The issue is not presented in this case because petitioners conceded in the district court that their proposed school use was "of a religious nature and [was] for a religious purpose." 770 F. Supp. at 92 (18a). They have never claimed otherwise. Indeed, the brochure they submitted to the local school board describes one of its purposes as advocating that "Christian values [be] instilled from an early age" (JA-86).

The argument, in any event, lacks merit, and to the extent that petitioners direct it to the state statute, their fears are unwarranted. No perfect separation of church from state is possible, and the First Amendment recognizes that fact. *Walz v. Tax Comm'n*, 397 U.S. 664, 669-70 (1970). "The very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement." *Id. See also Lemon v. Kurtzman*, 403 U.S. 602 (1971).[26] That standard is not violated by section 414.

The statute does not require the local school district to determine "which words and activities fall within 'religious worship and religious teaching' ", as petitioners contend, because that determination is simply not relevant. Instead, the statute asks an applicant to identify the *purpose* for the proposed use of a public school, and under state law it is the applicant's burden to demonstrate that the proposed use meets one of the criteria of section 414. *See Appeal of Smith*, 15 Educ. Dep't Rep. 491

26 Petitioners do not allege that the New York statute fails either of the other prongs of the three-part *Lemon* test.

(1976); *Matter of Use of the School-house in District No. 4*, 5 State Dep't Rep. 618 (Educ. Dep't 1915).

Any entanglement occasioned by asking an outsider why it proposes to use a public school is not, in light of the circumstances, excessive. A state may, without offending the Establishment Clause, require an organization which applies for a regulatory exemption, granted by statute to religious organizations, to "prove that [it] is a religious organization" within the meaning of the statute. *Larson v. Valente*, 456 U.S. 228, 255 n.30 (1982). If the implementation of Education Law § 414 results in any entanglement with religion, it is no more excessive than that in *Larson*. *See also Walz v. Tax Comm'n* (tax exemption for "properties used solely for religious worship" does not violate Establishment Clause).

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit, upholding the constitutionality of New York Education Law § 414, should be affirmed.

Dated: New York, New York
December 29, 1992

Respectfully submitted,

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